Sundai (M) Sdn Bhd v Masato Saito & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S4-22–756 OF 2007
ASMABI MOHAMAD JC
15 NOVEMBER 2012

Company Law — Directors — Breach of fiduciary duties — Director acting in wilful disregard of company's interest — Claim by private education centre against ex-director — Ex-director resigning and joining another similar private tuition centre — Setting up rival tuition centre — Poaching of staff from plaintiff company — Plaintiff's operations disrupted — Breach of duty to act in best interest of company — Whether director placing himself in position where his interest and duty conflicted — Companies Act 1965 s 132(1E)

Labour Law — Employment — Employee's duties — Duty of fidelity and good faith — Whether implied term imposed on employee to act in good faith and with fidelity to employer — Claim by private education centre against its ex-teachers — Ex-teachers resigning and joining another similar private tuition centre — Plaintiff's operations disrupted — Ex-teachers causing harm to plaintiff — Whether loyalty and fidelity towards plaintiff sacrificed

Tort — Conspiracy — Elements of — Conspiracy to poach staff from plaintiff tuition centre to set up rival tuition centre — Plaintiff's operations disrupted — Whether conspiracy proven

The plaintiff, a private education centre dealing with Japanese education programme, had commenced this action against its ex-teachers, the first, second and third defendants respectively for breach of duty of fidelity or good faith and breach of confidentiality. Additionally the plaintiff's cause of action against the first defendant was for breach of fiduciary duty. Besides the above three defendants the plaintiff had also cited the fifth and sixth defendants who were directors and shareholders of the fourth defendant, Leading Education Centre Sdn Bhd ('LEC') for conspiring with the first, second and third defendants to commit the tort of conspiracy. The first, second and third defendants (Saito, Tamura and Namiki) were previously teachers in the plaintiff's tuition centre in Kuala Lumpur. All these three teachers had come from Japan to work for the plaintiff and each of them had worked with the plaintiff from two to three years. In January 2007 all these three teachers decided to resign from the plaintiff and joined LEC's centre in KL. The fifth defendant ('Sato') who was originally the principal of the plaintiff, was now a

director and shareholder of the fourth defendant ('LEC Malaysia'). LEC Malaysia operated a tuition centre in KL similar to the plaintiff. The sixth defendant ('Takagi'), was a director and shareholder of LEC Singapore. LEC Singapore was a shareholder of the fourth defendant.

Held, allowing the plaintiff's claims with costs:

(1) The role of Saito in the plaintiff was not merely as its ordinary teacher. Saito was the first person in command as he was the principal of the plaintiff. As the director of the plaintiff Saito was bound by the provision of s 132(1E) of the Companies Act 1965 ('the Act'). By virtue of his position as a director of the plaintiff Saito had a duty to act in the best interest of the plaintiff. In a situation where there was a conflict between his duty to the company and his duty to his nominator, Saito should not subordinate his duty to act in the best interest of the company to his duty to his nominator. A person in a fiduciary position as Saito is not allowed to place himself in a position where his interest and duty conflict (see para 80).

(2) Whilst still the director of the plaintiff Saito was involved in improper acts which ran in conflict with his position as a director of the plaintiff. Despite having the information that a rival company was going to be set up by LEC KL Saito had failed to bring this to the attention of the plaintiff. He however had joined force with Sato, Takagi, Namiki, Tamura and LEC KL which had resulted in the most senior teachers and the core team in the plaintiff to resign from the plaintiff at the most crucial time just before the final examination, thus giving the plaintiff very short time and or no time at all to find good replacement teachers. This had caused disruption in the operations of the plaintiff. Saito had even poached his replacement, Tamura who was supposed to be the first person in command after 31 January 2007 to leave the plaintiff and joined LEC KL. Hence, Saito had breached his fiduciary duties to the plaintiff (see paras 84–85).

(3) In order to prove the tort of conspiracy, the plaintiff had to show the conspiratorial agreement followed by overt acts of causing damage. In order to sustain a claim under this head the plaintiff had to prove the following: (i) there must be an unlawful object or if not in itself unlawful, it must be brought about by unlawful means; (ii) there must be co-existence of an agreement with an overt act causing damage to the plaintiff; (iii) the tort is complete only if the agreement is carried out into effect causing damage to the plaintiff (see para 94); *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 referred.

(4) There was a combined and concerted action by Takagi and Sato to poach the ex-teachers teachers for the purpose of setting up LEC KL with the aim to compete with the plaintiff. The unlawful acts here in relation to

Saito was the inducement for Saito who was the director of the plaintiff and nominee of Sundai Japan to commit breach of his fiduciary duties to the plaintiff which under the law Saito had a duty to protect. Sato, Takagi, Saito and Namiki had also conspired to induce Tamura who was the plaintiff most senior teacher who was appointed to take over the post of the principal of the plaintiff to walk off from the plaintiff without giving any notice pursuant to his contract of employment with the plaintiff. Besides that these ex-teachers at the instigation of Sato and Takagi were guilty of committing breaches of duty of good faith and fidelity as well as breach of contract. The acts of these people had caused the operations of the plaintiff to be disrupted and brought about some form of instability to the plaintiff (see paras 96–98).

(5) As a general rule, although the term of contract that the employee must act in good faith and fidelity had not been spelt out in the contract, there is an implied term imposed on the employee to act in good faith and with fidelity to the employer (see para 104).

(6) All three ex-teachers went along and assisted Takagi and Sato in all possible ways to cause harm to the plaintiff. It is obvious that based on this scenario their loyalty and fidelity towards the plaintiff was sacrificed (see para 130).

[Bahasa Malaysia summary

Plaintif, sebuah pusat pengajian swasta menjalankan program pengajaran Jepun, telah memulakan tindakan ini terhadap bekas guru-gurunya, masing-masing defendan-defendan pertama, kedua dan ketiga bagi pelanggaran kewajipan kesetiaan dan kejujuran dan pelanggaran kerahsiaan. Tambahan, kausa tindakan plaintif terhadap defendan pertama adalah bagi pelanggaran kewajipan fidusiari. Selain daripada ketiga-tiga defendan di atas, plaintif juga menamakan defendan-defendan kelima dan keenam yang merupakan pengarah-pengarah dan pemegang-pemegang saham defendan keempat, Leading Education Centre Sdn Bhd ('LEC') kerana bersubahat dengan defendan-defendan pertama, kedua dan ketiga untuk melakukan tort konspirasi. Defendan-defendan pertama, kedua dan ketiga (Saito, Tamura dan Namiki) sebelum ini adalah guru-guru di pusat tuisyen plaintif di Kuala Lumpur. Ketiga-tiga guru ini telah datang dari Jepun untuk bekerja untuk plaintif dan setiap seorang daripada mereka telah bekerja dengan plaintif untuk tempoh dua hingga tiga tahun. Pada bulan Januari 2007, ketiga-tiga guru ini memutuskan untuk meletak jawatan dengan plaintif dan menyertai pusat LEC di KL. Defendan kelima ('Sato') yang pada asalnya merupakan pengetua plaintif, kini adalah pengarah dan pemegang saham defendan keempat ('LEC Malaysia'). LEC Malaysia menjalankan pusat tuisyen di KL yang serupa dengan plaintif. Defendan keenam ('Takagi'), adalah pengarah dan pemegang

saham LEC Singapura. LEC Singapura adalah pemegang saham defendan keempat. A

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Peranan Saito dalam plaintif bukan semata-mata sebagai guru biasa. Saito mempunyai peranan paling penting kerana dia adalah pengetua plaintif. Sebagai pengarah plaintif, Saito terikat oleh peruntukan s 132(1E) Akta Syarikat 1965 ('Akta tersebut'). Berikutan kedudukannya sebagai pengarah plaintif Saito bertanggungjawab untuk bertindak dalam kepentingan paling baik plaintif. Dalam keadaan mana terdapat konflik antara kewajipannya kepada syarikat dan kewajipan kepada penamanya, Saito tidak wajar mengetepikan kewajipannya untuk bertindak dalam kepentingan paling baik syarikat daripada kewajipannya kepada penamanya. Seseorang yang mempunyai kedudukan seperti Saito tidak dibenarkan meletakkan kedudukannya yang mana kepentingannya dan kewajipannya berkonflik (lihat perenggan 80). B C D

(2) Semasa masih pengarah plaintif, Saito terlibat dalam tindakan-tindakan tidak wajar yang bertentangan dengan kedudukannya sebagai pengarah plaintif. Walaupun mempunyai maklumat bahawa sebuah syarikat pesaing akan ditubuhkan oleh LEC KL Saito telah gagal untuk membawa perkara ini ke perhatian plaintif. Dia walau bagaimanapun telah menyertai Sato, Takagi, Tamura dan LEC KL yang mengakibatan guru-guru paling kanan dan pasukan penting dalam plaintif meletakkan jawatan pada waktu yang paling penting sejurus sebelum peperiksaan akhir, dengan itu memberikan plaintif masa yang sangat singkat dan atau tiada masa untuk mencari guru-guru ganti yang bagus. Ini telah menyebabkan gangguan dalam operasi plaintif. Saito juga telah cuba mendapatkan penggantinya, Tamura yang sepatutnya menjadi orang yang berperanan penting selepas 31 Januari 2007 untuk meninggalkan plaintif dan menyertai LEC KL. Maka, Saito telah melanggar kewajipan fidusiarinya kepada plaintif (lihat perenggan 84–85). E F G

(3) Untuk membuktikan tort konspirasi, plaintif perlu menunjukkan bahawa perjanjian persuhabatan diikuti oleh perbuatan terbuka menyebabkan kerugian. Untuk mengekalkan tuntutan di bawah tajuk ini plaintif perlu membuktikan yang berikut: (i) Perlu ada objek tidak sah atau jika tidak dengan sendirinya tidak sah, ia perlu dilakukan dengan cara yang tidak sah; (ii) Perlu ada kewujudan bersama perjanjian dengan perbuatan terbuka yang menyebabkan kerugian kepada plaintif; (iii) Tort tersebut lengkap hanya jika perjanjian tersebut dilakukan sebenarnya menyebabkan kerugian kepada plaintif (lihat perenggan 94); *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 dirujuk. H I

(4) Terdapat tindakan bersama dan terancang oleh Takagi dan Sato untuk mendapatkan bekas guru-guru bagi tujuan membentuk LEC KL dengan

tujuan untuk bersaing dengan plaintif. Tindakan tidak sah ini berkaitan dengan Saito adalah pendorong bagi Saito yang adalah pengarah plaintif dan penama Sundai Jepun untuk melakukan pelanggaran kewajipan fidusiarinya kepada plaintif yang mana Saito berkewajipan untuk melindungi di bawah undang-undang. Sato, Takagi, Saito dan Namiki juga telah bersubahat untuk mendorong Tamura yang merupakan guru paling kanan plaintif yang dilantik untuk mengambil alih jawatan pengetua plaintif untuk keluar daripada plaintif tanpa memberikan apa-apa notis berikutan kontrak pekerjaannya dengan plaintif. Malah, bekas guru-guru ini atas desakan Sato dan Takagi bersalah melakukan pelanggaran kewajipan kejujuran dan kesetiaan dan juga kemungkiran kontrak. Tindakan orang-orang ini telah menyebabkan operasi plaintif terganggu dan menyebabkan suatu bentuk ketidakstabilan kepada plaintif (lihat perenggan 96–98).

(5) Sebagai peraturan am, walaupun terma kontrak bahawa seseorang pekerja wajib bertindak secara jujur dan setia tidak dinyatakan dalam kontrak, terdapat terma tersirat yang dikenakan kepada pekerja untuk bertindak secara jujur dan setia kepada majikan (lihat perenggan 104).

(6) Kesemua bekas guru tersebut telah menuruti dan membantu Takagi dan Sato dalam kesemua cara yang mungkin untuk menyebabkan kerugian kepada plaintif. Adalah jelas bahawa berdasarkan kepada senario ini kesetiaan dan kejujuran mereka terhadap plaintif telah dikorbankan (lihat perenggan 130).]

Notes

For cases on breach of fiduciary duties, see 2(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 195–208.

For cases on elements of, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 83–87.

For cases on employee's duties, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1171–1182.

Cases referred to

ABB Holdings Pte Ltd and others v Sher Hock Guan Charles [2009] 4 SLR 111, HC (refd)

Aerostar Maintenance International LTD and another v Christopher Wilson and others [2010] EWHC 2032, Ch D (refd)

Faccenda Chicken Ltd v Fowler [1987] Ch 117, CA (refd)

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332; [2001] 8 CLJ 26, HC (refd)

Item Software (UK) Ltd v Fassihi [2004] EWHC Civ 1244, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Marrinan v Vibart [1962] 1 All ER 869, QBD (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)
Mutual Life Insurance Co of New York v The Rank Organisation Ltd [1985] BCLC 11, Ch D (refd)
Robb v Green [1895] 2 QB 315, CA (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)
SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd [2008] 4 MLJ 187; [2008] 4 CLJ 20, CA (refd)
Seah Siang Mong v Ong Ban Chai [1996] MLJU 484; [1998] 1 CLJ Supp 295, HC (refd)
Takako Sakao (f) v Ng Pek Yuen & Anor (f) [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others [2008] EWHC 1974, QBD (refd)

Legislation referred to
Companies Act 1965 s 132(1E)

HM Ooi (Angeline Lee with him) (HM Ooi Associates) for the plaintiff.
Kenneth Gomes (Sabarudin Othman & Ho) for the first to sixth defendants.
Fourth defendant unpresented.

Asmabi Mohamad JC:

BACKGROUND FACTS

[1] By its summons and statement of claim dated 14 March 2007 ('SOC') the plaintiff, a private education centre dealing with Japanese education programme, had commenced this action against its ex teachers, the first, second and third defendants respectively for breach of duty of fidelity or good faith and breach of confidentiality. Additionally the plaintiff's cause of action against the first defendant was for breach of fiduciary duty. Besides the above three defendants the plaintiff had also cited the fifth and sixth defendants who were directors and shareholders of the fourth defendant, Leading Education Centre Sdn Bhd ('LEC') for conspiring with the first, second and third defendants to commit the tort of conspiracy.

[2] The plaintiff withdrew its action against the seventh defendant who had since passed away and also its action against the eight defendant on 23 September 2012.

[3] The trial before this court which took ten days only concerned the first to the sixth defendants. All these defendants except for the fourth defendant were represented by learned counsel Mr Kenneth Gomez of Messrs Sabarudin Othman & Ho. Whilst the plaintiff was represented by Mr Ooi Hooi Min of Messrs HM Ooi & Associates.

[4] Only the first and third defendants testified. The second defendant sat throughout the proceedings but for no reason opted not to give evidence to defend his case and be subjected to cross-examination. The fourth defendant was not represented by any counsel and had proceeded with the trial unrepresented and without adducing any evidence. The fifth and sixth defendants did not offer any evidence and were not present throughout the trial. The third defendant testified that he had not been in contact with the fifth defendant since the case was instituted in 2007 and stated that he did not know if the fifth defendant would want to give any evidence in court. As regards the sixth defendant, the third defendant informed the court that he was also giving evidence on behalf the sixth defendant but on the other hand reiterated that the sixth defendant had told him he had nothing to do with this case.

[5] At the outset of the trial both learned counsel had indicated to this court that they wished to proceed on the issue of liability first and in the event liability was established, the issue of damages would be heard at a subsequent date to be fixed by the court.

[6] After hearing the evidence of the plaintiff's five witnesses ('PW1–PW5') and the defendant's two witnesses ('DW1 and DW2'), and upon reading and hearing the submissions by the respective learned counsel both written and oral I found that the plaintiff had proved its case against the first to sixth defendants on the balance of probabilities. Hence I found the first to sixth defendants liable to the plaintiffs and allowed the plaintiff's claims in terms of prayers (a)–(e) with costs.

[7] The defendants being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

THE DOCUMENTS

[8] At the outset of the trial parties have agreed for the following documents to be used:

	Description		Document
(a)	Bundle of pleadings	-	'A'

(b)	Common agreed bundle number 1	-	'B1'
(c)	Common agreed bundle number 2	-	'B2'
(d)	Common agreed bundle number 3	-	'B3'
(e)	Common agreed bundle number 4	-	'B4'
(f)	Common agreed bundle number 5	-	'B5'
(g)	The plaintiff's bundle of document no 1	-	'B6'
(h)	The plaintiff's bundle of document no 3	-	'B7'
(i)	The plaintiff'sbundle of document no 2	-	'C'
(j)	Statements of agreed facts	-	'D'
(k)	Issues to be tried	-	'F'

THE UNDISPUTED FACTS

[9] The following facts were adduced during the trial and were not disputed by both parties:

(a) the plaintiff, previously known as the Nippon Education Academy Sdn Bhd ('Nippon') was set up in 1993. Nippon was bought over by the Sundai Group Japan ('Sundai Japan') in November 2004 and its name was changed to Sundai (M) Sdn Bhd;

(b) the plaintiff (Sundai Malaysia), is a private education centre which operates a *shingaku jyuku* (in Japanese) or tuition centre for children of Japanese expatriates living in the Klang Valley;

(c) the tuition classes are held between 4–10pm, six days in a week especially for children preparing for junior high school or high school entrance examinations in Japan.

(d) the first, second and third defendants (Masato Saito ('Saito')), (Atsushi Tamura ('Tamura')) and (Yoshio Namiki ('Namiki')) were previously teachers in the plaintiff's tuition centre in Kuala Lumpur ('KL'). All these three teachers had come from Japan to work for the plaintiff and each of them had worked with the plaintiff from two to three years. In January 2007 all these three teachers decided to resign from the plaintiff;

(e) the fifth defendant (Mitsutoshi Sato ('Sato')) was the director and shareholder of the fourth defendant ('LEC Malaysia'). LEC Malaysia is currently known to operate a tuition centre in KL similar to the plaintiff.

Sato was also a teacher and operated the fourth defendant's tuition centre in Johor Bahru ('LEC JB'). Subsequently Sato operated the fourth defendant's tuition centre in KL; and

(f) the sixth defendant (Toshiyuki Takagi ('Takagi')) is a Japanese citizen, who at the material times, resided in Singapore. Takagi was a director and shareholder of LEC Singapore. LEC Singapore was a shareholder of the fourth defendant after 16 April 2007.

THE CASE IN A NUTSHELL

[10] This was a dispute between two Japanese education providers:

(a) Sundai Malaysia which provides tuition services in line with the Japanese Government school curriculum learned by Japanese students mostly attending the Japanese School of Kuala Lumpur which is located in Subang Jaya ('JSKL') and also English language tuition to Japanese students who either attend JKSL or international schools in the Klang Valley; and

(b) LEC KL, which is also a private tuition centre which provides similar tuition services as mentioned above to the Japanese children who either attend JKSL or international schools in the Klang Valley.

BACKGROUND OF THE DEFENDANTS

[11] For ease of reference and to enable the reader of this judgment to appreciate the facts of the case and the nexus between each of the defendants herein I would attempt to describe each of the defendants as follows:

(a) Saito was a long standing employee of the plaintiff who had served as the principal of the Sundai Malaysia from 2004 until his resignation in January 2007. Saito was also the director of the plaintiff until his resignation in January 2007. Prior to the entry of Sundai Japan into Sundai Malaysia in 2004 Saito, Tamura and Sato worked for Shimomata at Nippon as teachers. Hence all three knew each other as colleagues;

(b) Tamura, was a long standing employee of Sundai Japan who upon Saito's resignation in January 2007 had been appointed as the new principal of Sundai Malaysia. Tamura suddenly left the plaintiff together with Saito and Namiki without tendering his resignation. Tamura later join Saito and Namiki in LEC KL;

(c) Namiki was a teacher with the Sundai Japan since 2004. Namiki worked as a teacher in Sundai Shanghai prior to his transfer to the plaintiff in

2005. He was the vice-principal of the Sundai Malaysia. His position as the vice-principal made him the second most senior person in the school after Saito;

(d) LEC Malaysia is currently known to operate a tuition centre in KL which curriculum, purpose and objective are similar to that of Sundai Malaysia;

(e) Mitsutoshi Sato, was a teacher with the plaintiff before it was bought over by Sundai Japan. Sato left Sundai Malaysia to open LEC in Johor Bahru ('LEC JB'). At the material times Sato was the director and Shareholder of LEC Malaysia;

(f) when the plaintiff was taken over by Sundai Japan in 2004 the sixth defendant ('Takagi') was the overseas school supervisor for Sundai Japan with Shimomata as his deputy. Takagi was until the end of 2005, Sundai Japan's manager for its operations and a director/supervisor of Sundai Linden School (S) Pte Ltd ('Sundai Singapore') which was the Sundai Japan's Singapore Company. After Takagi left Sundai Japan at the end of 2005 and till this date he is the principal and the person solely in charge of a private tuition centre in Singapore known as LEC Singapore which is carrying its business similar to that of the plaintiff; and

(g) prior to the entry of Sundai Japan into the plaintiff in 2004 Sato, Saito and Tamura all worked for Shimomata at Nippon, as teachers and all these three gentlemen knew each other. Sato, Saito and Tamura became acquainted with Takagi upon the entry of Sundai Japan into the plaintiff.

THE CASE FOR THE PLAINTIFF

[12] For the purpose of this judgment the description of the plaintiff and or Sundai Malaysia wherever appropriate would be used interchangeably. The description of Saito, Namiki and Tamura and or the ex teachers would also be used interchangeably wherever necessary. As the facts and the events in this case are pertinent to demonstrate the parts played by each of the defendants in realising the common objective I have no choice but to state them in a rather detailed manner.

[13] Sundai Malaysia commenced its services as an education provider for the children of Japanese expatriates since 1993 under the name of Nippon. In 2004 Nippon was bought over by the Sundai Japan and its name was changed to Sundai (M) Sdn Bhd ('Sundai Malaysia'). Sundai Malaysia was owned and controlled by Shimomata. The seventh defendant, one Ishak bin Hamzah, now deceased, was registered as the shareholder and director of Nippon. Sundai Malaysia was and still is a licensed tuition centre under the Ministry of

Education. This licence was issued to the seventh defendant who was also the chairman of the board of governors of the Sundai Malaysia.

[14] Ishak, besides being the licence holder was also the shareholder of the plaintiff. He was also the liaison person who was responsible to deal with the government departments on all matters pertaining to the plaintiff, amongst others, application for visas and all related employment documents for the employees of the plaintiff.

[15] Both Shimomata, the deputy overseas school supervisor for Sundai Japan and Takagi, who was the then overseas school supervisor of the Sundai Japan, were involved with the negotiations for the taking over of Nippon by the Sundai Japan in 2004.

[16] Sato, Saito and Tamura were all known to each other, having worked in the Sundai Japan prior to the buying over of Nippon by the Sundai Japan in 2004. All these three gentlemen became acquainted with Takagi after Sundai Japan came into the plaintiff (as per Q&A 16 of WSPW1).

[17] In 2003 Ishak, Shimomata and Sato set up LEC as a subsidiary of the plaintiff. LEC was used to open Nippon Education Academy located in Johor Bahru (LEC JB). In November 2004 Shimomata left the Sundai Japan and transferred all his interest in the plaintiff to one Yamazaki. After Shimomata left the Sundai Japan, Sato left the plaintiff and took charge of LEC JB with Ishak acting as the chairman of the board of governors and the licence holder for LEC JB.

[18] Upon its acquisition by Sundai Japan the plaintiff's name was changed from Nippon Education Academy to *Pusat Tuisyen Sundai Nippon Education*.

Events leading to the formation of LEC KL

[19] Takagi resigned from Sundai Japan in November 2005 under unpleasant circumstances. This resignation was due to the discovery by the Sundai Japan of Takagi's intention to 'go independent'. Takagi was accused of setting up another education provider similar to the one operated by the plaintiff to compete with the plaintiff. He was also alleged to have misappropriated the funds of the Sundai Japan in Hong Kong and Singapore.

[20] Takagi's plan to set up a rival tuition centre to compete with the plaintiff could be traced from an email entitled 'Deeply sorry for my carelessness' sent by Saito, who was the principal and director of the plaintiff, to Takagi dated 3 August 2005 where Saito had informed Takagi that he was considering

Takagi's proposal seriously as he had already acquired some knowledge about management during his span with Sundai Malaysia. This email sent to Saito which was supposed to be confidential was shared with Namiki who Saito trusted. The important contents of the email to Takagi were that 'the GM might be considering to become independent although it has not been confirmed yet'. In the same email Saito had given the assurance to Takagi that the details of the plan by Takagi had not been leaked to the Namiki and or other staff. Saito ended the email by asking for forgiveness for his carelessness in not keeping the information he obtained from Takagi confidential (see exh P15 pp 1–2 of document C). With this email both Saito and Namiki were aware of Takagi's plan to set up a rival education centre as early as 3 August 2005. Neither Saito nor Namiki had disclosed the plan by Takagi to open a rival tuition centre to compete with Sundai Malaysia to Sundai Japan. Both Saito and Namiki were aware that Takagi's plan to set up a rival tuition centre might jeopardise the position of Sundai Malaysia.

[21] Around February 2006 Takagi had set up LEC Singapore. A few teachers who were teaching in Sundai Overseas School Singapore such as Mitsuru Matsuura and Makoto ito left and joined Takagi in LEC Singapore. For some reasons known to them, Sundai Japan did not pursue any action against Takagi and or Matsuura and or Ito and the matter rested there.

Saito and Namiki's loyalty to Takagi

[22] The Saito's affiliation towards Takagi could be gauged from his evidence in court where he had testified that Takagi has strong leadership and was a better supervisor to the Sundai Overseas Schools compared to Oyabu who was much less supportive of the plaintiff. Saito had also described that the situation in the school had deteriorated after Takagi left the Sundai Japan as its oversea school supervisor and was replaced by Oyabu.

[23] After Takagi set up LEC in Singapore both Takagi and Sato were planning to set up LEC Malaysia. It was admitted by Saito that Sato was already looking for premises to start the tuition centre in KL and Takagi was also involved at this stage. Both Sato and Takagi were targeting to commence this tuition centre just in time for the new academic year in 2007. Takagi was also willing to raise Saito and Namiki's salaries up to 20–30% more than the salaries paid to them by Sundai Malaysia if both agreed to join LEC KL.

[24] In order to set the ball rolling LEC KL then entered into a tenancy agreement (exh P8 at pp 105–114 of B5) for the rental of a premise in Plaza Damas which was about the same size of the plaintiff's premises. Around this time LEC KL was not even issued with the licence to operate a tuition centre by

the Ministry of Education. Neither did LEC KL have any students enrolled to enable it to commence business as a tuition centre for Japanese children for new academic year in 2007.

[25] The plan to set up and commence business by Takagi was made as early as February 2007. This was evidenced by the emails exchanges between Takagi and Minoru Toida ('PW3') who had disguised as 'Ryoto Kondo' a Japanese parent who was interested in looking for a tuition centre in KL for his two sons. This could be clearly seen in exh P22 (at pp 21–30 of bundle C) whereby PW3 under the guise of one Ryoto Kondo had used his Singapore email address and introduced himself to the recipient as a parent who would posted to KL and interested in looking for a good tuition school for his sons. This email from Ryoto Kondo ('PW3') which was sent to LEC's Singapore was responded by Takagi who had informed Ryoto Kondo (PW3) that LEC would commence business effectively on 15 March 2007. In his email dated 1 March 2007 Takagi responded to Ryoto Kondo by saying that LEC KL was waiting for Ryoto Kondo to update Takagi of his KL address once he arrived in Malaysia. Further Takagi had also mentioned to Ryoto Kondo that LEC Malaysia in KL would be opening in May 2007. Both these emails were forwarded to PW1 and PW5.

[26] Saito and Namiki had also gone to Singapore at the expense of the plaintiff (Q&A 26 of WSPW1 and exh P43 (loose sheet)) to meet Takagi and Sato for the purpose of the setting up of LEC KL. Both Saito and Namiki had also admitted in cross-examination that they were offered to work for LEC KL on 12 November 2006. LEC KL tuition centre was also expected to be operational in February 2007. The decision to join LEC KL by Saito was made a week after the Singapore trip. Both Saito and Namiki had planned to leave the plaintiff together.

[27] Saito admitted that *xcentric21hotmail.com* and *kentoo21@hotmail.com* were his email accounts. There were exchanges of emails between Saito and Takagi at email address *takagi1764@yahoo.co* to Saito's accounts which was admitted by Saito (see exh P31 at p P31 at p 99 of document C). These emails relate to LEC KL, mention of Tamura's offer letter, the tenancy agreement and meeting to be held in Singapore on 12 November 2006. As a follow-up from the email, a meeting was in fact held on 12 November 2006 where Saito and Namiki had met up with Takagi in Singapore to plan for the setting up of LEC KL. Saito's email correspondences were unveiled by Minora Toida (PW3) a director of SATT Inc, a member of the Sundai Japan who specialises in information technology, education and development. PW3 was sent to help Tamura run the plaintiff after Saito and Namiki resigned from the plaintiff. PW3 had investigated Saito's and Namiki's personal computer but had trouble starting them. However PW3 could start up Saito's lap top and found out from the 'Back-up PC' in F drive a lot of files, including email exchanges between

Saito and Takagi. By using software called 'Scavenger' PW3 was able to trace that Saito had been using a 'hotmail' email account on his desktop. PW3 could view Saito's email accounts. From PW3's investigation Saito was using two hotmail accounts, which were *xcentric21hotmail.com* and *kentoo21hotmail.com*. PW3 was able to retrieve the emails as shown in exhs P29 and P30 (pp 82–85 and pp 86–98 of bundle C).

[28] In the course of investigation into the ex teachers personal computers allocated to them the plaintiff had also uncovered that the ex teachers had taken with them the confidential information belonging to the plaintiff such as the 'student list' and 'operations information' which were not readily available to the public and if fallen into the wrong hands would be highly detrimental to the plaintiff. The leakage of the above two documents could be disastrous to the plaintiff as the rival could solicit the customers of the plaintiff and enticed them to join the rival school thereby causing great loss to the plaintiff. As regards the operations information, this information was only made available to the staff and customers of the plaintiff for the sole purpose of the administration of the plaintiff.

[29] Takahiro Shimizu ('PW2'), the vice-principal of Sundai Shanghai testified that around December 2006, PW2 had been contacted by Namiki, who had told PW2 that he had something private to discuss with PW2. After the discussion Namiki had actually flown to Shanghai on 16 December 2006 to meet up with PW2. Also present during the meeting was Matsuura. In the discussion PW2 was informed about the setting up of the new school by LEC in KL in March 2007. PW2 was coaxed by Namiki to join the new school.

[30] In the said meeting both the Namiki and Matsuura had also told PW2 most of the teachers in the plaintiff would be leaving Sundai Malaysia to join LEC KL. PW2 was interested to join LEC as Namiki had always been kind and helpful to him and he felt comfortable working with Namiki. PW2 then resigned from his post in late December 2006 and was preparing to go to KL to start his new venture in LEC. PW2 had also tendered his resignation to Sundai Japan.

[31] When one Yoshiro Kubo, the supervisor of Sundai Shanghai came to PW2's school to investigate some employment issues which relate to some people causing trouble to Sundai Japan, PW2 mentioned to Kubo about him leaving Sundai Japan. Kubo then told PW2 to be careful as Sundai was contemplating to take legal action against those responsible. PW2 again contacted Namiki to convey to Namiki about the likelihood of Sundai Japan taking action legal action against LEC KL or them and Namiki responded by saying that Sundai Japan could not do anything to LEC KL. Even assuming

that LEC KL were to lose the case the most it would have to pay was about 500,000 Yuen only which LEC KL would have no problem paying (see pp 3–5 of Q&A 10 of WSPW2).

[32] When Matsuura informed PW2 of his posting to LEC JB, PW2 felt LEC JB was too small a school for him to handle. After having been offered by Sundai Japan a posting in Hong Kong, PW2 then decided to forgo the idea of joining LEC KL. He then informed Saito and Namiki of his decision and both Saito and Namiki had asked PW2 to reconsider his decision. Both Saito and Namiki assured PW2 that if he agreed to reconsider his decision Takagi could consider to station PW2 in LEC Singapore instead of LEC JB.

[33] Namiki was also responsible for poaching Tamura to leave the plaintiff to join LEC KL. Tamura joined slightly later as Sato was scouting for a mathematics teacher for LEC KL and targeted Tamura. In his cross-examination Namiki admitted having spoken to Tamura about the offer to work for LEC KL on the instruction of Sato sometime in December 2006 or January 2007. Besides approaching Tamura, Namiki had also admitted having spoken to Toyoshima towards the end of December for the same purpose. The offer letter for Tamura had been drawn and given to him on 3 January 2007 (exhs P31 and P30 at pp 86–99 of document C). The same was also sent to Saito. Namiki had initiated to recruit PW2 whilst PW2 was still in the employment of the plaintiff.

[34] Saito testified that he received the offer to work for LEC KL somewhere in November 2006 but did not disclose the date he accepted the offer. Saito had also admitted that he was partially involved in recruiting Tamura into LEC KL. Saito could not tell if the idea to approach Tamura was suggested by Takagi or Sato. However Saito testified that the first person to approach Tamura was Namiki. He also confirmed that he had approached Toyoshima to join LEC KL but could not tell the date he approached Toyoshima. In cross-examination Saito testified that at the time he approached Tamura and Toyoshima he was still in the employment of the plaintiff.

[35] Further Saito had also attempted to coax Miss Tam Mok Lan ('PW4') who is the plaintiff's administration manager to leave the plaintiff. PW4 also knew Sato as Sato was her old boss. PW4 also knew Takagi who was based in Singapore and who used to come to the plaintiff until he left the plaintiff at the end of 2005. According to PW4 in September 2006, Ishak had told her that Sato and Takagi had asked him to help them set up a tuition centre in KL and PW4 had told Ishak not to assist these two gentlemen to set up a rival tuition centre as it would be bad for the plaintiff. Ishak agreed with PW4 and the matter rested at that stage.

[36] In December PW4 had told Namiki that his work permit was due to expire and had to be renewed. Instead of instructing PW2 to renew the work permit Namiki had told PW4 to hold on. PW4 later found out that Namiki was going to resign from the plaintiff and return to Japan. Both Saito and Namiki had also vented their frustrations to PW4 about Yamakuro's treatment towards them. Among the reasons cited was their dissatisfaction over their low salaries and the fact that they were treated badly by Sundai Japan. PW4 related an incident where she had gone out for lunch with Saito and Namiki and during this lunch Saito had told PW4 that he had the choice to go back to Japan or joined Takagi in Singapore or join Sato as Sato was opening a tuition centre in KL. During the said lunch Saito had asked PW4 if she was happy working with the plaintiff and further told PW4 that if PW4 wanted a job in LEC KL, Sato would be calling her. However PW4 did not respond to this.

[37] PW4 suspected that both Saito and Namiki were working together with Sato and Takagi to open up a tuition centre in KL. Later PW4 became more suspicious when she received a call from a renovation contractor asking for Namiki. PW4 found this strange as Namiki was going back to Japan and further for the whole duration of his stay in Sundai Malaysia, it was not his norm to deal with the local people for anything. PW4 then told what she suspected to Iwasa ('PW1'). When PW1 visited the plaintiff on 25 January 2007 and PW4 was attending to PW1, PW4 received a SMS in her phone and the sender was Saito with the SMS stating 'Good morning. Now your condition is dangerous. If you don't mind. I want to meet you today'.

[38] At the time Saito left the plaintiff, he surrendered the company car that he was using. On one occasion PW4 happened to borrow the said car and she found a letter of an offer to rent a premise at Mont Kiara in the said car (see pp 142–143 of bundle C). PW4 had also found out that many students were quitting the plaintiff between January and March 2007. With the help of PW1, the quit notices were translated to the English language (see exh P74 of document B7). The plaintiff's record showed that about 79 students had given notices to quit and other students left without even giving any notices. In April the plaintiff had only 59 students out of 133 in 2006. PW4 reiterated that except during the economic crash in 1997/1998 at other times the plaintiff had more than 100 students at a time.

[39] The departure of the ex teachers had drastically contributed to the sudden drop in the students' enrolment of the plaintiff in February 2007. The students in the plaintiff were leaving to join a new school which was set up set up with the help of the ex teachers (see exh P19 (at pp39–40 of document C)). This was evidenced by a letter by Ishak addressed to the parents of the children notifying these parents of the fact that a big number of students had left the plaintiff to join a new tuition centre which was to be set up in the near future.

There were words of caution in exh P19 that the new school might not have the proper licence issued by the relevant authority to run the tuition centre. There was a plea for the parents to take back their children to the plaintiff. The full contents were as stated in exh P19. Vide exh P20 (at pp 45–47 of document C) Ishak had gone further to clarify the reason he had assisted Sato in setting up LEC KL was on condition that the centre should never become a competitor to the plaintiff. From the tone of these letters (exhs P19 and P20) it was obvious that the students of the plaintiff were leaving the plaintiff to join a newly set up school, which was, LEC KL.

The resignation of Saito, Namiki and Tamura

[40] The news about the resignation of Saito and Namiki were disclosed through the email sent by Saito to Oyabu dated 29 December 2006 (see exh P11 at pp 3, 7, 5, 9, 11 and 13 of document C) where Saito pretended as if he did not have the information pertaining to Namiki's resignation. Saito told Oyabu that he was very disappointed and quite depressed having heard about the news of Namiki's resignation. Further Saito reiterated that he had persuaded Namiki to stay on in the plaintiff but failed as Namiki had already made up his mind. In cross-examination Saito admitted that at the time he emailed Oyabu it was almost confirmed that Namiki was firm in resigning from his position in Sundai Malaysia. Despite having known this, Saito went with the flow and pretended to sound surprised and depressed. Saito had also wanted to discuss with Oyabu how to go about his resignation. Vide his email dated 2 January 2007 Saito had indicated his intention to resign from Sundai Malaysia to Oyabu and his last day of working with the plaintiff would be the end of January. Saito cited his reason for resignation was to seek career advancement (see exh P10 at p 6 of document C).

[41] As demonstrated earlier Saito had admitted in cross-examination that he was involved with the recruitment of Tamura to LEC Malaysia. As at 3 January 2007 vide email from Takagi to Saito, (see exh P31 at p 99 of document C) Saito was also provided with Tamura's letter of offer from Takagi. However Saito made no mention of this to the top management of the plaintiff and or to Sundai Japan. Even in his email to Kenji Ishibachi dated 4 January 2007 Saito did not disclose any information pertaining to Tamura's resignation to Ishibachi when the same had asked him to complete the handing over of his duties to Tamura who would be taking over his post as the principal of the plaintiff (see exh P10 at pp 7–8 of document C). On 4 January 2007 Oyabu had caused an email to be sent to the first defendant's successor, Tamura asking Tamura to try his best to take charge of things in the plaintiff as Tamura was taking over the functions of Saito as the principal of Sundai Malaysia (see exhs P10–P11 at pp 9–10 of document C). As regards the issue of human affairs Oyabu informed Tamura that the manager would be liaising with him. Further

having realised of the critical situation the plaintiff was in after the departure of Saito and Namiki, Oyabu had given the assurance to Tamura that he would provide Tamura the necessary back-up. Tamura however had left the plaintiff on 24 January 2007 without officially tendering his resignation to the plaintiff.

[42] Minoru Toida (PW3) testified that he was despatched from Sundai Japan to help out the plaintiff during the transition period as some teachers were leaving the plaintiff. PW3 was sent to assist Tamura the new principal of the plaintiff. When PW3 arrived on 24 January 2007 at about 4pm, he was told that Tamura was also leaving the plaintiff together with Saito and Namiki and they had indicated that 24 January 2007 was their last day in the school. All three of these gentlemen had also told PW3 that they would not be reporting for work the next day. At the time all three left at very short and or no notice the plaintiff had very little time to look for substitute teachers to replace them. Two more teachers who were still serving the plaintiff were Toyoshima and Okamoto who compared to the three ex teachers were comparatively junior in terms of experience. Even Toyoshima was coaxed by Saito to leave the plaintiff and joined LEC KL. However it was turned down by Toyoshima. Otherwise the plaintiff would be left with only one teacher.

[43] At the time the ex three teachers walked out from the plaintiff, the plaintiff was left with three teachers and one of them, one Tatsumi would be leaving in March as the contract would expire in March 2007. However in the interim looking at the acute situation the plaintiff was in, Tatsumi agreed to stay on to assist the plaintiff until the situation was under control.

The significance of 24 January 2007 date

[44] The 24 January 2007 was the most significant date for the plaintiff as on this date Saito, Namiki and Tamura resigned from the plaintiff and walked out from the plaintiff's premises. On the day they left the plaintiff they refused to sign the 'Standard Non-Disclosure Contract' (see exh P14 of document C and its translation at p 34 of the same document). However all the keys were returned to the plaintiff. Takeshi Iwasa of Sundai Japan ('PW1') had personally come to Malaysia to check on things on site.

[45] Both PW3 and Toyoshima had arranged for a meeting with the parents to be held on 30 January 2007 to explain to the parents of the current problems faced by the plaintiff. The meeting was scheduled at 10am. All of a sudden the Saito, Namiki and Tamura turned up at the meeting with the parents. PW3 then told all three of them they would be given the opportunity to speak to the parents but at the appropriate time and were told to wait in another room. All three gentlemen insisted that they be given the opportunity to address the parents to protect their honour. Despite being told not to be involved in the

meeting with the parents all three insisted that they be given the chance to address the parents in that meeting. In order to avoid further complications all three were subsequently allowed to sit through the meeting. It was obvious that the presence of the three ex teachers were to disrupt the meeting. Despite the fact that they had left the school they chose to address the parents without even being invited to do so by the teachers. The parents too didn't seem to be surprised with the news of the ex teachers' resignations. PW3 described it to mean the environment at that point was as if it was so obvious to the parents what was happening to the plaintiff.

[46] When the three ex teachers left on the 24 January 2007 they did not give their replacements any proper briefing. They left without any consideration at all as to what was going to happen to the plaintiff given their untimely departure and short and/or no notice to resign from the plaintiff. Further when Saito called for the meeting with the parents on 30 January 2007 the plaintiff would have little or no time to properly settle in the replacements teachers and or to plan properly on how best to address the parents.

[47] The plaintiff had organised further meetings with the parents on 27–28 February 2007 and 1 March 2007 respectively but from the temperament of these meetings PW3 found out that all parents who turned up for the meetings were not interested to listen to the plaintiff but came with the intention to withdraw their children from the school. Most of the notices to quit were handed on these dates. The parents seemed to be more concerned about the three ex teachers than trying to understand and or appreciate the problems faced by the plaintiff.

The setting up of LEC KL

[48] The documents pertaining to the setting up of LEC KL could be gleaned in exh P7 (at p 1 of B5) which was an application submitted by Ishak on behalf of LEC KL to the registrar of schools seeking for permission to set up a tuition centre specifically for the Japanese student. Attached to exh P7 was a project paper justifying its setting up (exh P8 at pp 2–117 of document B5). Nippon Education Academy (JB) Sdn Bhd had its name changed to Leading Education Centre Sdn Bhd on 7 February 2007 (at p 21 of exh P8; also see the directors' resolution to authorise change of name at p 22 of exh P8). The names of the directors of LEC KL could be seen at pp 36–37 of exh P8. One Mitsuru Mitsuura who worked for Takagi at LEC Singapore was appointed to the board of the LEC KL.

[49] Nippon Education Academy (JB) Sdn Bhd had in fact signed a tenancy agreement with one Seow Wee Cheong for the rental of premises No M-2–15 & M-2–17, Plaza Damas, No. 60, Jalan Sri Hartamas 1, Sri Hartamas, 50480

KL for the setting up of the tuition centre (pp 104–114 of P8). As documented in exh P8 (at p 38 of document B5) Mitsutoshi Sato as transferor had transferred his shares of RM30,000 in Leading Education Centre Sdn Bhd (formerly known as Nippon Education Academy (JB) Sdn Bhd) to LEC Singapore (see p 38 of exh P8). All documentations pertaining to Saito, Namiki and Tamura's employment with the LEC KL were as stated at pp 77–85 of exh P8 which clearly showed that all three ex teachers had officially commenced their employment with LEC KL as at April 2007 as teachers (see exh P8 pp 77–79 for (Saito), pp 80–82 for Namiki and pp 83–85 for Tamura of B5).

PW1's visit to LEC KL premises

[50] On 17 May 2007 and 21 May 2007 respectively PW1 had made spot checks on LEC KL's new tuition centre at premises number Prima Pelangi 6 in Segambut (see exh P75 at p 57 of document C) which was quite close to the plaintiff and found that the three ex teachers were teaching several former students of the plaintiff in a linked house. During the visits PW1 saw a few Japanese parents and a few school buses dropping Japanese children in front of the house where the three ex teachers were teaching. The ex teachers were seen greeting these Japanese children. During his second visit to the premises where the ex teachers were teaching PW1 went straight to the premises and saw the rooms downstairs were used as classrooms and Saito was teaching the students. Later PW1 was confronted by Namiki (see pp 58–69 of document C — exh P75). Despite the fact that the ex teachers had started employment with LEC KL in April 2007 as shown in exh P8 (at pp 77–85 of document C) as at 24 July 2007 LEC KL had not been issued with a licence to operate the tuition centre.

CASE FOR THE DEFENDANTS

[51] For the purpose of the trial only two out of the six defendants testified. Tamura, the second defendant despite being present throughout the trial had opted not to testify. The fourth defendant was not represented and did not adduce any evidence in defence to the plaintiff's case against it.

The evidence of Saito

[52] Saito is currently a teacher in a Japanese school in Leading Education Centre Singapore. According to Saito the plaintiff was set up in 1993 and was known as Nippon Education Academy Sdn Bhd. The main directors and shareholders of Nippon were Shimomata and his wife. The seventh defendant was a nominee director of Shimomata and it was the seventh defendant who obtained the permits for the Japanese teachers at Nippon. Saito was employed as a teacher in Nippon in 1999. Around 17 November 2004 Nippon was

bought over by Sundai Japan and upon its acquisition by Sundai Japan its name was changed to Sundai Malaysia. Saito was appointed as its principal of Nippon and remained in that position until his resignation on 31 January 2007.

[53] Saito was never the managing director of the plaintiff but was mainly a teacher teaching social studies, science and English. Saito admitted he was made the director of the plaintiff somewhere in December 2004. Since Saito was appointed as the principal of the plaintiff it was a matter of convenience that he too was appointed as the director of the plaintiff. Saito was never paid any director's fees or allowance and whatever he received from the plaintiff was merely his salary. Saito was also not paid any profit for his position as the director. He was also not a shareholder of the plaintiff.

[54] Saito was only the employee of the plaintiff and all decisions pertaining to the plaintiff were made by Sundai Japan including rentals and remuneration to the seventh defendant. The plaintiff never held any director's meetings. All decisions over the management of the company were dictatorial mainly made by Yamakuro and Sundai HQ. Saito's position in the plaintiff was merely a figurehead position and it was just a matter of convenience to appoint him as the director. Saito resigned as a teacher and director of the plaintiff on 31 January 2007.

[55] According to Saito he had never given any permission to anybody to extract his personal information from his hard drive and if any extraction of information was illegally done and without his permission.

[56] As a principal of the plaintiff, Saito had with him the student list, which contained the list of students studying at the plaintiff as at December 2006. This list would be compiled by the teachers themselves. As the school had only two administrative staff, it was the teachers who prepared and updated the student's list from time to time. So it was so natural for the teachers to have the list with them. Every year the students list becomes redundant because some children would leave the plaintiff due to their parents' relocation. Hence whatever the plaintiff had was valueless and new students would have to be recruited. In addition to that Saito also testified that the teachers were responsible for recruiting students into the plaintiff.

[57] As regards why more students left the plaintiff after the ex teachers left for LEC KL, Saito said it was the plaintiff's fault as the plaintiff had not done enough to attract new students. Firstly Toyoshima who took over from him had very little experience in teaching and lacked the counselling skill. Hence the plaintiff failed to obtain the trust of the parents. Other teachers appointed such as Okamoto Yoko, Sato Motokaka, Kawakami Kenichi, Oozeki Nozomi too

had very little experience in teaching with one year experience or they were merely part time teachers. This showed Sundai HQ was not serious about the teaching quality in the plaintiff. The atmosphere in the school was not as warm as it used to be during the time the three ex teachers were there. In short the plaintiff lost its students due to its own incompetency.

[58] Saito further testified that the ex teachers had every right to be associated with the parents of the students and this could not be helped as the Japanese community in Malaysia was small and they were bound to meet these parents. The ex teachers were the attraction in the plaintiff and when they left the plaintiff the pupils followed them to the new school. The plaintiff had to build its reputation by providing quality services in order to attract the parents and the children to the school and this according to Saito, was lacking in the plaintiff.

[59] As regards the timetable for the school, Saito testified the timetable of the new tutorial was similar across the board as each tutorial centre had to follow the schedule of either the Japanese International School or any other international school. Classes in the tutorial centre could only commence after all classes of JSKL ended for the day.

[60] Saito admitted he prepared the manual for making telephone calls before his resignation with the plaintiff as a protection from the plaintiff. The victory timetable and tuition fees for the new tuition centre were also prepared by him. As Saito had been working in KL since 1999 as a tutor he knew what exactly the Japanese parents and children would be looking for in any new tutorial centre. With his experience he knew exactly how and what to prepare for the new school. Saito had named the time table as 'Victory Timetable'. These documents were prepared at home and forwarded to his office computer for purposes of printing only.

[61] Saito testified that he was never given a regulation handbook. Neither had Saito seen one. Saito merely signed annual contracts with the plaintiff which was in English for purposes of work permit. The schedule of fees which the plaintiff was claiming as confidential information was given out freely to every parent of the student who came to inquire about the school fees when he visited the school to inquire the about the services provided by the plaintiff. There was no resolution passed by the board of directors of the plaintiff to declare the schedule of fees as confidential information or trade secret. There was also no resolution passed to declare the students list as confidential information or trade secret.

[62] Both the students list and schedule of fees were in fact readily available and to be distributed to the public if requested. Even if the students list were to

fall to other persons' hands at the end of it all, it was the parents' decision whether to send their children to a particular school depending on the merits of the teachers in that school.

[63] The Japanese school system is based on three terms with breaks in between for the Japanese School Curriculum. The first term of the school commenced from the first week of April. The recruitment drive for the new students would be on 27–28 February 2007 and 1 March 2007. At the end of school year which is February it is normal for schools to lose a number of students. The plaintiff had 188 students in that year and it lost 88 students as 55 students went back to Japan and 13 students joined another school. The plaintiff had 100 registered students and out of this only about 20 students opted to join LEC KL.

The evidence of Namiki

[64] The third defendant, Namiki testified that the fourth defendant was initially known as Nippon Education Academy (JB) Sdn Bhd (LEC JB). The original shareholder of LEC JB, Shinomota had sold his shares in LEC JB to Ishak and the fifth defendant, Mitsutoshi Sato (Sato) by disposing 51,000 shares for a consideration of RM51,000. On 5 February 2003 Ishak was made the director of LEC JB and held the shares in LEC JB. The licence to operate LEC JB as a tuition centre was issued by the Ministry of Education in the name of Ishak.

[65] LEC JB had been operating a tuition centre in Johor Bahru known as Nippon Education Academy (JB) Sdn Bhd (LEC JB) and had been in business since 2003. LEC JB's directors and shareholders, Shimomota and Sato had no connection with the plaintiff. The only reason LEC JB was cited in this case was because the ex teachers joined LEC KL after they left the plaintiff. As regards the licences to operate LEC JB as well the plaintiff, Ishak was the person responsible for obtaining the licences for these two tuition centres. As Ishak had already applied and successfully obtained the licences for these two tuition centres, Ishak was also asked to assist LEC KL in obtaining the licence to operate a tuition centre which was subsequently issued to LEC KL. Sato and Takagi had no business link with the plaintiff and these two defendants were brought in because the ex teachers had joined LEC KL as teachers. Apart from obtaining the licences for LEC JB and LEC KL Ishak did not play any part in plaintiff's school or in LEC KL.

[66] As regards Sato, he was at the material time a director as well as shareholder of 30,000 shares of LEC JB. Sato had since given up his shares and directorship in LEC JB and had returned to Japan shortly after the action was instituted against the defendants. Sato was a teacher and operated LEC JB and

subsequently Sato operated LEC KL together with Ishak. Takagi who is also a Japanese, is a director and shareholder of LEC Singapore. LEC Singapore was also a shareholder of LEC JB after 16 April 2007.

[67] According to Namiki the plaintiff brought the suit against the defendants based on personal vendetta against Takagi. At the material times Namiki and five other teachers were working for the plaintiff. The reputation of the plaintiff very much depended on abilities of these teachers who had worked really hard from 2004 to January 2007 in bringing up the reputation of the school. Besides the plaintiff and LEC KL there were a few other similar schools in existence such as Mugen Gakhen (Informity Sdn Bhd), JOBA International Kuala Lumpur (JOBA International Sdn Bhd), ACT (Pusat Tuisyen Chahaya Timur) and Wing (Bestesteem Sdn Bhd). Each of this school had a total enrolment of approximately 350 students. The total estimates of all Japanese students were about 700 students.

[68] Namiki testified that the schedule of fees and operations information (at pp 32–72 of B6 (also see Q&A 20 of WSDW1) which the plaintiff claimed to be confidential information that was allegedly stolen by the ex teachers was in fact not confidential information and could readily be available at the counter or could be picked up by anybody interested to obtain them. These documents were freely distributed to the parents. The management had not classified these documents as trade secrets and or confidential information. Neither were the ex teachers informed by the top management that these documents were confidential information and or trade secrets. With the kind of experience the ex teachers' had after having worked as teachers for a considerable number of years they would be able to come up with all these documents for the new school without referring to the plaintiff's documents.

[69] The same applied to the students list which contained the personal data of 188 students such as their addresses both postal and email, telephone numbers and other personal particulars were also not confidential and or a trade secret. All the six teachers in the school knew each of the students by name as well as their personal information without the need to refer to the alleged confidential information. Further the Japanese community in Malaysia is so small and these ex teachers were in personal contact and or in communication with them. These documents too were dynamic documents which needed to be updated and revised from time to time as some students would be leaving Malaysia for Japan and or their parents relocated elsewhere.

[70] Besides that The Japan Club of Kuala Lumpur located at No 2, Jalan 1/86, off Jalan Taman Seputeh, 58000 Kuala Lumpur too had a membership directory of Japanese citizens residing and working in Malaysia (exh D92 (a)

(loose copy)). This directory contained all the information including parents' contact numbers both residential and working places plus other personal information.

[71] As regards to whether the leakage of the student's list as alleged by the plaintiff had resulted in the plaintiff losing its students to other tuition centre Namiki testified that at the end of the day it is left entirely to the parents to use their own wisdom and judgment to decide for themselves which would be their preferred school. Normally the parents would look at the set of teachers each school had to enable them to gauge the quality of the teaching of a particular school.

[72] Pertaining to the terms of contract with the plaintiff Namiki stated that the teachers merely signed the contract with the plaintiff annually or biannually and not with Sundai Japan. The teachers' salaries were being paid by the plaintiff and whatever benefits the ex teachers enjoyed would be pursuant to the annual letters of employment they signed with the plaintiff and not Sundai Japan. Neither was the regulation handbooks given to them and or the ex teachers had seen them.

[73] Namiki further testified that all three ex teachers resigned from the plaintiff on or around 31 January 2007 and the plaintiff had accepted their resignations without any qualms despite the short notices given. As such the issue of their resignation was considered resolved and a non-issue.

[74] As to the reasons the ex teachers were present during the meetings with the parents their sole purpose was to apologise to the parents and also to protect their names and honour from the plaintiff's negative campaign against them.

[75] Further Namiki cited the reasons for leaving the plaintiff which amongst others were:

(a) insecurity of tenure as their employment with the plaintiff was either on the basis of annually or biannually;

(b) their performance was not evaluated accordingly despite the fact that they had managed to raise good income for plaintiff;

(c) their working conditions had not been improved by the plaintiff;

(d) with effect from 2007 each of them would be losing a cut on their bonuses about RM15,000 (Tamura), RM18,000 (Namiki) and RM24,000 (Saito) respectively;

(e) they had been humiliated by Yamakuro, the supervisor of Sundai HQ who had never appreciated their sacrifices and continuous efforts in giving their best to the plaintiff;

(f) unlike Takagi, Oyabu Hiroshi who was Sundai Overseas Schools in South East Asia region lacked leadership qualities and provided no assistance to them;

(g) all their efforts in getting the income for the plaintiff were wasted on Sundai Japan's officers who were lavish with their spending and had wasting habits. They either travelled first or business class and stayed in five star hotels and given expensive souvenirs;

(h) the ex teachers who earned the money were not rewarded appropriately for their hard work and or accorded with recognition; and

(i) the ex teachers were exploited and all that the plaintiff cared for was the company's name and brand.

[76] Namiki shared the same sentiment as Saito as to the reasons the plaintiff was not able to attract its students to stay on in the plaintiff and I would not attempt to restate them here.

[77] Pertaining to the setting up of a rival school to compete with the plaintiff Namiki testified that it was natural and healthy to have a competitor in the business world. As Sundai is a huge company the ex teachers would not be able to compete with it. Further as a result of the consent order LEC KL had changed its original plans from using Japanese as the medium of language to English. The syllabuses too were changed from Japanese to International (see letter dated 24 July 2007 to the Ministry of Education at pp 1–117 of document B5). Unfortunately the market for this kind of education was not so profitable. Hence the ex teachers had no choice but to leave LEC KL.

FINDINGS OF THE COURT

[78] With the above facts that I had narrated which were digested from the evidence adduced during the trial below are my findings.

BREACH OF FIDUCIARY DUTY AGAINST SAITO

[79] The plaintiff's cause of action against Saito was for breach of his duties as a fiduciary of the plaintiff. The details of the plaintiff's claims against Saito could be gleaned at para 39 of the SOC, the gist of the claims were as follows:

(a) Saito who was the director of the plaintiff was involved in and had supported improper acts of the ex teachers in setting up a new rival school

in Klang Valley to rival and compete with the plaintiff using confidential information without prior informed consent of the plaintiff;

(b) Saito had breached his duties towards Sundai Malaysia by causing or knowingly allowing LEC JB or the conspiring parties to take steps in establishing the new rival school in direct in direct competition with the plaintiff and without prior informed consent of the plaintiff;

(c) Saito as a director of Sundai Malaysia has breached his duties towards Sundai Malaysia by acting to the detriment of Sundai Malaysia with other conspiring parties with the intention and or predominant purpose of causing harm to Sundai Malaysia;

(d) Saito as a director of Sundai Malaysia had breached his duties towards Sundai Malaysia by procuring and/or allowing to be procured by himself, Sato, Takagi and LEC JB the breaking of contracts by Sundai Malaysia with its ex teachers and its customers in advancement of their objectives to form a new rival school; and

(e) Saito as a director of Sundai Malaysia had breached his duties towards Sundai Malaysia by disseminating and/or allowing to be disseminated Sundai Malaysia's confidential information to be used for slurring the plaintiffs name and the setting up of new rival school to take away the business from Sundai Malaysia.

[80] The role of Saito in the plaintiff was not merely as its ordinary teacher. Saito was the first person in command as he was the principal of the plaintiff. In addition to that Saito was a nominee director of Sundai Japan. As the director of the plaintiff Saito was bound by the provision of s 132(1E) of the Companies Act 1965 ('Act'). By virtue of his position as a director of the plaintiff Saito had a duty to act in the best interest of the plaintiff. In a situation where there was a conflict between his duty to the company and his duty to his nominator, Saito should not subordinate his duty to act in the best interest of the company to his duty to his nominator.

[81] This principle which had been entrenched in s 132(1E) of the Act had been illustrated in a number of authorities which were cited by learned counsel for the plaintiff. All the authorities seemed to suggest that a person in a fiduciary position as Saito is not allowed to place himself in a position where his interest and duty conflict. Saito as a fiduciary was bound to put aside his personal interest whenever a regard to them conflicted with the proper discharge of his duty. Saito must not allow himself to enter into engagements in which there was likelihood that he might be bound to disregard the interest of whom he was bound to protect.

[82] As a fiduciary Saito had a duty to disclose to the management of the

plaintiff of any activity, be it actual or threatened which might affect the interest of the plaintiff. In *Item Software (UK) Ltd v Fassihi* [2004] EWHC Civ 1244 it was stated that it is the fundamental duty of a director to act in good faith and in the best interest of the company. This duty of loyalty is the 'time honoured-rule: per Goulding J in *Mutual life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 12.'

[83] As a director Saito must at all times be loyal to the plaintiff and he had a duty to discharge his duties with utmost good faith and must not at any expense use his position for his own personal benefit instead of the benefit of his fiduciary. Saito must not place himself in a position which may pose him to a situation that his duties to the plaintiff might be in conflict with his personal interest.

[84] Based on the evidence I had narrated in the plaintiff's case it was clear that whilst still the director of the plaintiff Saito was involved in improper acts which ran in conflict with his position as a director of the plaintiff. Despite having the information that a rival company was going to be set up by LEC KL Saito had failed to bring this to the attention of the plaintiff. He however had joined force with Sato, Takagi, Namiki, Tamura and LEC KL which had resulted in the most senior teachers and the core team in the plaintiff to resign from the plaintiff at the most crucial time just before the final examination. Thus giving the plaintiff very short time and or no time at all to find good replacement teachers. This had caused disruption in the operations of the plaintiff.

[85] It was also in evidence that Saito as the director had even poached his replacement, Tamura who was supposed to be the first person in command after 31 January 2007 to leave the plaintiff and joined LEC KL. After being poached by Takagi and Saito, Tamura left the plaintiff to join Saito and Namiki in LEC KL without even tendering his resignation. Hence Saito had allowed Tamura to breach his contract of employment. Saito knew that Sato had given the instruction for Namiki to talk to Tamura as Sato was looking for a dedicated subject teacher especially in mathematics for LEC KL but did nothing to protect the interest of the plaintiff.

[86] Namiki and Saito had a role to play to coax Tamura who specialised in mathematics to leave the plaintiff and joined them in LEC KL. This was done at the crucial time when Tamura was about to take over the task as a principal in place of Saito and help organise the plaintiff after Namiki and Saito decided to resign from the plaintiff abruptly. Both had spoken to Tamura either in December 2006 or January 2007 well before the effective date of their resignations. Tamura's offer letter was circulated by Takagi and a copy of the same was also sent via email to Saito who was the director of the plaintiff. Saito

had admitted in cross-examination that either Sato or Takagi had instructed him to approach Tamura. Saito admitted under oath that he was partially responsible for the recruitment of Tamura into LEC KL. When further quizzed by learned counsel for the plaintiff and having realised that he ought not to have blurted his role in recruiting Tamura for LEC KL, Saito's simple and safe answer was 'I don't know'.

[87] As at 3 January 2007 when Saito's contract with the plaintiff was still subsisting and his directorship with the plaintiff was still subsisting Saito did not mention a word to Ishibachi about Tamura's plan to leave the plaintiff when Ishibachi had requested him to complete the handover note to his successor Tamura. Saito had also admitted that he had attempted to recruit Toyoshima to join LEC KL and at that particular time he was still employed by the plaintiff. This was done when Saito was still the director of the plaintiff.

[88] Despite having been asked by Oyabu for a proper handing over note to be prepared to assist Tamura in the smooth taking over of the plaintiff after Saito resigned from the plaintiff Saito did nothing. Saito who was still the director of the plaintiff in turn poached the key person in the plaintiff and or coaxed him to leave the plaintiff.

[89] A close reading of the facts I had illustrated above would demonstrate the role played by Saito who by virtue of his position as a director had breached his fiduciary duties to the plaintiff. As the director of the plaintiff Saito should have taken care of the interest of the plaintiff than his own personal interest. Saito had assisted Takagi and Sato in the setting up of LEC KL even whilst he was the director of the plaintiff. All the events that I have highlighted in the preceding paragraphs clearly demonstrated evidence of breaches of fiduciary duties by Saito.

[90] Saito was fully aware of Sato and Takagi's plan to set a rival school to compete with the plaintiff and the fact that Namiki who was the vice principal was also leaving the plaintiff but did nothing to notify the plaintiff.

[91] Based on the foregoing there was sufficient evidence before this court on the standard required by the law that Saito as the director had breach his duties to his fiduciary and had allowed his personal and private interest to conflict with his duties as the director of the plaintiff.

THE ALLEGATION OF CONSPIRACY AGAINST THE FIRST TO SIXTH DEFENDANTS

[92] The plaintiff's claim that the ex teachers, Sato and Takagi had

collectively conspired with one and another with a predominant intention to injure the plaintiff by unlawful and wrongful means and towards that end they had caused and or induced breaches of contracts. The particulars of the plaintiffs allegations were as contained in para 40 of the plaintiff's SOC.

[93] In order to prove the tort of conspiracy, the plaintiff had to show the conspiratorial agreement followed by overt acts of causing damage (see *Marrinan v Vibart* [1962] 1 All ER 869 at p 869). A charge of conspiracy is a serious one. Therefore the plaintiff must plead the facts of this tort sufficiently in its pleadings by giving full particulars of the assertion pertaining to the conspiracy theory.

[94] In order to sustain a claim under this head the plaintiff had to prove the following:

(a) there must be an unlawful object or if not in itself unlawful, it must be brought about by unlawful means;

(b) there must be co-existence of an agreement with an overt act causing damage to the plaintiff; and

(c) the tort is complete only if the agreement is carried out into effect causing damage to the plaintiff, (see *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393).

[95] The test to be used in a cause of action founded on the tort of conspiracy had been set out in the case of in *Aerostar Maintenance International Ltd and another v Christopher Wilson and others* [2010] EWHC 2032 as follows:

> Accordingly there must be a *combination*, to carry out *unlawful acts*, which are the means by *which injury is intended to be inflicted*; there must be an intention to injure AMIL and there must be *resulting loss and damage*.

(also see *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187; [2008] 4 CLJ 20 and *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332; [2001] 8 CLJ 26; *Seah Siang Mong v Ong Ban Chai* [1996] MLJU 484; [1998] 1 CLJ Supp 295).

[96] From the facts that I had narrated earlier on there were sufficient evidence to prove that there was a combined and concerted action by Takagi and Sato to poach and the ex teachers teachers for the purpose of setting up LEC KL with the aim to compete with the plaintiff. Both Takagi and Sato being ex employees of Sundai Malaysia and or Sundai Japan had made used of LEC KL as a vehicle to lure the employees of the plaintiff by promising them an increase of between 20–30% of the salaries which were paid by the plaintiff. Sato and Takagi had made used of Saito, Namiki and subsequently Tamura to

cause all these three gentlemen who were the core teaching group in the plaintiff in terms of experience to abruptly resign from the plaintiff at the crucial moment where the final examination was about to commence thereby causing havoc and disruption in the plaintiff giving the plaintiff very little or no time to find replacement teachers.

[97] The unlawful acts here in relation to Saito was the inducement for Saito who was the director of the plaintiff and nominee of Sundai Japan to commit breach of his fiduciary duties to the plaintiff which under the law Saito had a duty to protect. Sato, Takagi, Saito and Namiki had also conspired to induce Tamura who was the plaintiff most senior teacher who was appointed to take over the post of the principal of the plaintiff to walk off from the plaintiff without giving any notice pursuant to his contract of employment with the plaintiff. Besides that these ex teachers at the instigation of Sato and Takagi was guilty of committing breaches of duty of good faith and fidelity as well as breach of contract.

[98] It was without doubt that the acts of these people had caused the operations of the plaintiff to be disrupted and brought about some form of instability to the plaintiff. The evidence which was adduced during the trial had demonstrated that the parents had lost their confidence and faith in the plaintiff which had resulted in most parents quitting the plaintiff either with and or without any notices.

[99] The unlawful acts of Sato, Takagi, Saito, Namiki and Tamura had resulted in the plaintiff losing 57 students. Even Saito and Namiki admitted about 20 of the plaintiff's students followed them to LEC KL. The students attended tuition at LEC KL despite the fact that at that material time it was not issued with the licence to operate a tuition centre by the Ministry of Education. This would undoubtedly cause the decline in the plaintiffs revenue for the year 2007.

[100] The abrupt departure of Saito, Namiki and Tamura had caused some kind of disruption in the plaintiff. Hence this had affected the plaintiff's reputation in the eyes of the parents. This had also placed the plaintiff under a lot of stress as it had to look for replacement teachers who were not easy to get given the time constraint and urgent need for these replacement teachers to come to from Japan to serve the plaintiff and the proximity of the final examination.

BREACH OF GOOD FAITH AND FIDELITY

[101] The plaintiff's next cause of action against the ex teachers could be gleaned in para 38 of the SOC where all these three ex teachers were alleged to

have breached their contract of employment by deliberately timing their abrupt resignation and or premature termination from the plaintiff. This had disrupted the operations of the plaintiff as the resignations of all three ex teachers were done just before the final examination. This according to the plaintiff had caused unnecessary inconvenience and expense as new teachers would have to be appointed to replace them at very short notice.

[102] An employer is justified in insisting that all its employees remain loyal and shall at all times act in the best interest of the employer.

[103] The principles which governed the duties and obligations owed by an employee to his employer had been well illustrated in the leading case of *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at p 135 which could be summarised as follows:

(a) in a situation where both the employee and the employer are and or had been linked by a contract, then the obligations of employee are to be determined by the contract between him and the employer; and

(b) in the absence of any express term, the obligations of the employees are subject to implied terms.

[104] The law generally provides that the relationship between an employer and employee, if not expressly provided in the contract, then there is an implied term imposed on the employee to act in good faith and with fidelity to the employer. This principle had been established in an old case of *Robb v Green* [1895] 2 QB 315 at p 317 where it was held:

> … upon the question whether in a contract of service the court can imply a stipulation that the servant will act with good faith towards his master … I think that in a contract of service the court must imply such stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract.

[105] Further in *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR 111 the court had also recognised that being in the position of a senior employee in a company may give rise to fiduciary duties owed by the employee holding that position, even though he is not a director of the company. At p 117 the court said:

> (1) The employment relationship could give rise to fiduciary duties. A senior employee could owe the same fiduciary duties to his employer as a director of that employer would. The more senior the employee and the greater the responsibility assumed by him, the greater would be the likelihood that he did owe such duties …

[106] In the case of the ex teachers Saito was the principal of the plaintiff

with Namiki as the vice principal. Tamura was appointed as the principal of the plaintiff in place of Saito. Therefore the ex teachers were senior employees of the plaintiff and persons responsible for recruiting new students and maintaining students enrolment. This was admitted by Saito and Namiki in their evidence.

[107] The documents which relate to the appointment of the ex teachers were the letters of offer, the acceptances and the letters for the extension of the contracts. In the case of Saito he was appointed pursuant to exh P48 which was accepted by him (at pp 1–6 of bundle B4) and this contract of service was extended for two more years from 28 February 2006 which was also accepted by Saito (exh P49 at pp 7–10). Tamura's contract of employment was for the period between 1 March 2002 and 28 February 2006 (exh P50 and was extended as per P51 (at pp 17–21 of document B4). In the case of Namiki his English language contract was not produced as it was kept by Ishak. However in an affidavit in reply filed by Ishak affirmed on 12 April 2007 Ishak had deposed that Namiki's contract documents which were in his possession had been misplaced (See pp 98–144 and at p 132 of document B1).

[108] The Japanese language contract of employment of Saito could be found at pp 22–37 of document B4. Tamura's Japanese language contract could be seen at pp 28–31 of document B4 and Namiki's Japanese language contract could be seen at pp 34–37 of document B4. The ex teachers were also bound by the Rules of Employer and Employees in Sundai Overseas Schools — a Japanese language document setting out the rules of employment applicable to teachers in Sundai's Group's overseas tutorial centres (see exh P61 at pp 73–104 of document B6).

[109] Pursuant to exhs P49 and P51 both Saito's and Tamura's contracts provided that whilst in the employment of the plaintiff Saito, Tamura and also Namiki were obliged to protect and project the good image of the plaintiff and to abide by all the regulations and Malaysian laws and regulations (see cl 7.1 of exh P49 and cl 11 of exh P51).

[110] As a general rule, although the term of contract that the employee must act in good faith and fidelity had not been spelt out in the contract, there is an implied term imposed on the employee to act in good faith and with fidelity to the employer as 'it is a thing which must necessarily have been in view of both parties when they entered into the contract' (see *Robb v Green* [1895] 2 QB 315 at p 317).

[111] Sato and Takagi's plan to set up a rival school and to poach the plaintiff's core teachers could be gauged as early as 3 August 2005 via an email sent by Saito to Takagi. This email indicated that Saito had early notice of the

setting up of LEC KL which was going to be a rival tuition centre. Saito kept quiet about this. Saito had admitted in cross-examination that the GM (Takagi) might be considering of becoming independent and that Saito had shared this information with Namiki. Saito admitted what he meant by 'become independent' meant that Takagi had plans to set up a rival tuition centre.

[112] From the testimony of both Saito and Namiki it was obvious that these two teachers were very much aligned to Takagi. Both testified that Takagi was their preferred supervisor and the situation in Sundai Japan's schools deteriorated after Takagi left Sundai Japan. Oyabu was not of much assistance to them and did not give the support they required. On the other hand Takagi had strong leadership capability and was a better superior. It was without doubt that these two teachers were still loyal to Takagi.

[113] There was evidence before this court that LEC KL were gearing to set up a tuition centre in KL as early and 2005 and were making preparations towards achieving its goal. LEC was poaching the plaintiff's teachers as early as August 2005. LEC KL had targeted to commence business as early as March 2007 despite having not obtained the licence to operate a tuition centre (see p 26 of bundle C) and having nothing concrete as at November 2006 LEC KL had given the assurance to a prospective parent it would be commencing business in March 2007. It had even entered into a tenancy agreement (see exh P8 at pp 105–114 of document B5) for rental of premises in Plaza Damas, KL and this is the current location of LEC KL.

[114] Both Saito and Namiki had flown to Singapore on 12 November 2006 to meet Sato and Takagi and planned the setting up of LEC KL. Both had used up the funds of the plaintiff for this purpose. At this time both Saito and Namiki were clear in their minds to leave the plaintiff to join LEC KL. From the emails produced in this court from 29 November 2006 Saito and Takagi were gearing their plans to leave the plaintiff (see exh P30 at pp 86–98 of document C) which Saito admitted in cross-examination having received these emails. Both Saito and Namiki had also admitted that it would take quite a while for any organisation to earn the reputation as a good tuition centre and this would very much depend on the sort of teachers that tuition centre had. Both further admitted that it was their reputation and the trust the parents had in them that made the tuition centre attractive to the parents. Both knew that an organisation such as the plaintiff would require some time to re-establish the kind of reputation it had and their abrupt resignation would cause the plaintiff to suffer and cripple.

[115] Both Saito and Namiki had a role to play in influencing the parents to issue the notices to quit. It was in evidence that around the time Saito and

Namiki were leaving the plaintiff many parents who turned up during the meetings were more concerned with the resignation of the teachers than trying to appreciate the critical situation the plaintiff was facing. Most of the parents had come to withdraw their children from the plaintiff (exh P74 of bundle B7). This had caused alarm to the plaintiff so much so Ishak had no choice but to issue a letter (exh P19 at pp 39–40 of bundle C2). From this letter it was in evidence that a big number of students were quitting the plaintiff to join a new tuition centre which claimed to be opened in the near future. This letter purported to warn the parents not to enrol their children in the new tuition centre. In the same letter Ishak was quoted to have said 'somebody was hijacking' the plaintiff's students. It was obvious that the situation was so bad otherwise there was no reason for Ishak to issue exh P18 in that tone.

[116] The students of the plaintiff started to leave the plaintiff. A larger portion of the parents submitted the notices to quit starting from 14 February 2007 with the largest number of notices to quit given on 28 February 2007. PW2 testified that around those times the plaintiff received 79 notices to quit. There were also some students who merely walked away from the plaintiff without giving any notices to quit. The enrolment of the plaintiff dropped in two months from February 2007 to April 2007 from 133 to 59. This figure did not include 23 students who had completed their courses. Out of 79 students who did not provide notices to quit 22 of them left the plaintiff because their parents were leaving Malaysia. At least 57 students left to go to other tuition centre.

[117] The ex teachers had obtained their work permits from the Immigration Department of Malaysia on 16 May 2007. The application for a licence to operate LEC KL was made 24 July 2007 (exh P7 at p 1 document B5). Despite the fact that LEC KL had not been issued with the licence to operate the tuition centre by the Ministry of Education the ex teachers were already running the rival tuition centre as at 17 May 2007 and or 21 May 2007 respectively.

[118] In his cross-examination Namiki admitted that LEC KL had in fact started business with 20 of the plaintiff's student having joined LEC KL. Despite the LEC KL illegal status Namiki testified that as at 27 July 2007 about 40 students had enrolled into LEC KL. The fact that Saito, Namiki and Tamura were able to mobilise LEC KL within a short period after their departure from the plaintiff showed that their scheme to assist Sato and Takagi to commence a rival tuition centre to compete with the plaintiff had begun even when they were all still employed by the plaintiff using all the information they obtain by virtue of their positions in the plaintiff especially the express speed LEC KL was able to enrol new students to commence the new tuition centre.

[119] By their deliberate attempt to resign from the plaintiff and the concealment of the fact that all three of the ex teachers were planning to leave the plaintiff and joined the ex teachers had acted to the detriment and against the interest of the plaintiff.

[120] In exh P20 (at pp 45–47 of document C2) Ishak had also cause a letter to be sent to Sundai Japan where he admitted that he had helped Sato to set up a new tutorial centre.

[121] PW1 had testified that by the end of January and up to March 2007, 79 of the plaintiff's student withdrew from the plaintiff. Out of this number only 22 cited returning to Japan or leaving Malaysia as reasons for their withdrawals.

[122] It was also in evidence that some of the plaintiff's students later attended tuition in LEC KL. Even Saito admitted about 20 of the plaintiff's ex student registered with LEC KL despite the fact that it was not officially operational, the licence having been issued only in July 2007. From exh P18 (see pp 142–143 of document C2) LEC KL received a letter for rental of an office space in Plaza Mont Kiara from 1 February 2007 which was in the same locality as the plaintiff's premises.

[123] PW1 had testified that on 9 February 2007 soon after the ex teachers left the plaintiff he had gone to premises at Unit M2–15/17, Plaza Damas, No 60, Jalan Hartamas 1, 50480 KL and PW1 returned to the same address on 8 March 2007. On 12 March 2007 PW1 returned to the same premises and found that the renovation works had commenced in the said premises (exh P21 at pp 48–51 of bundle C2). PW1 caught sight of Saito, Tamura and Namiki.

[124] With the help of Toida (PW3) PW1 had also retrieved some information about the whole scheme orchestrated by the ex teachers and found in Saito's hard disc the time table for the period 22 January 2007 onwards (see exh P33 at pp 105–111 of bundle C) which included the names of Saito, Namiki and Tamura as teaching in the plaintiff 10 February 2007 and from March onwards their names were not included.

[125] Saito had also admitted whilst still with the plaintiff he prepared what he termed as the victory time table (exhs P36, P38, P37 and 39 at pp 117, 119, 118 and 120 of bundle C) for LEC KL for March to July and September to December 2007 listing Namiki, Tamura, Shimizu, one Helen and himself as the teachers who would be teaching the classes in LEC KL. The schedule of fees (exh P40 at p 122 of document C) was also prepared showing the fees for Grade 5S, Grade 6S, Grade 7, Grade 8, and Grade 9 were deliberately priced cheaper than the plaintiff's schedule of fees.

[126] The manner the ex teachers left the plaintiff ought to be taken into consideration in deciding the issue of breach of good faith and fidelity. At the material times there were six teachers in the plaintiff. Tatsumi would be leaving the plaintiff when her contract expired in March 2007 and giving the plaintiff sufficient time to find a replacement for her. Both Saito and Namiki were firm in their decisions to leave the plaintiff as early as November 2006 but had opted to withhold their intentions to resign until the end of December and or January 2007. They only conveyed to the plaintiff of their intentions to leave at the end of January 2007 at the crucial moment when the students were about to sit for their final examination. Thus giving the plaintiff little or no time to find their replacements. Both Saito and Namiki at the instruction of Sato and Takagi had recruited Tamura the most senior teacher and the key person who was scheduled to have replaced Saito as the plaintiff's new principal after 31 January 2007. Tamura did not even resign from the plaintiff. Tamura just walked out from the plaintiff to join LEC KL. Even Toyoshima was coaxed by Saito, Namiki, Sato and Takagi to leave the plaintiff to join LEC KL. The action of these ex teachers had placed the plaintiff in a very critical situation affecting its reputation and capability to carry on as a good tuition centre.

[127] These ex teachers too did not leave the plaintiff in a professional way. They left without even giving the proper briefing to the replacement teachers who were much junior in terms of experience.

[128] Further when the meeting was called by Saito on 30 January 2007 the plaintiff was in a state of mess and had little or no time to get itself ready to brief the parents about its next course of action in view of the abrupt resignations of their core teaching team. Hence putting the plaintiff in a very chaotic and embarrassing situation.

[129] As at December 2006 Saito and Namiki were acting on the instructions of Takagi and Sato and were actively poaching and enticing the plaintiff's teachers such as Tamura and Toyoshima. About 80% of the plaintiff's work force was affected in the whole scheme orchestrated by Sato and Takagi with the assistance of Saito, Namiki and later Tamura.

[130] Further Namiki acting on the instructions of Takagi, had gone ahead to recruit Shimizu who was stationed in Shanghai. Namiki's enthusiasm could be seen from the fact that he had flown to Shanghai with a specific aim, which was, to entice Shimizu to join LEC KL. Both Saito and Namiki and even Tamura knew exactly that what Sato and Takagi was planning was to disrupt the plaintiff's operations and that was precisely what Sato and Takagi did in Singapore which had caused the destruction of the Sundai Group school in Singapore. What Sato and Takagi were doing to the plaintiff was similar to the Singapore episode. Hence a repeat of the event which happened in Singapore

which had affected the plaintiff's tuition centre in Singapore badly. Despite that all three ex teachers went along and assisted Takagi and Sato in all possible ways to cause harm to the plaintiff. It is obvious that based on this scenario their loyalty and fidelity towards the plaintiff was sacrificed.

[131] In *UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others* [2008] EWHC 1974 (QBD) a case quoted by learned counsel for the plaintiff it was held that:

> I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the company itself, the company itself, the more so when they are themselves party to these plots and plans. It seems to me that would be an obvious breach of duties of loyalty and fidelity …

[132] Saito and Namiki who were employees of the plaintiff were responsible for the operations and running of plaintiff but at the same time had embroiled themselves with the scheme engineered by Sato and Takagi which was in conflict with their duties of loyalty and fidelity as employees to the plaintiff. Even assisting the competing company in setting up LEG KL whilst still in the employment of the plaintiff like in the case of Saito, Namiki and Tamura had been held to be in breach of duty of good faith and fidelity (see *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR 111 at p 52).

[133] The acts of the defendants in this case were somewhat similar to the acts of the defendants in *UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others* [2008] EWHC 1974 (QBD) where there was secret plotting 'to go together en masse and to join en masse a new start up competitor' resulting in a knockout blow of the opponent and crippling them. The court held:

> It is here the secret plotting to go together en masse and to join en masse a new start up competitor which is objectionable, for, as must have been foreseen and indeed intended, what was sought was a knockout blow to paralyse UBS, to torpedo them, as Mr McGregor put it, to make it difficult for UBS properly and professionally to continue to service their existing customers UBS was entitled to their loyalty and fidelity which, it seems to me, it may not have received. It is to my mind, highly likely that this plotting and planning will be held to have taken place, which would be unlawful in itself or at least an unlawful means conspiracy.

THE CASE AGAINST SATO, TAKAGI AND TAMURA

[134] In so far as Sato, Takagi and Tamura, all these three witnesses did not offer any evidence during the trial. Neither Sato nor Takagi was present in court. As for Tamura, despite being present throughout the proceedings Tamura opted not to offer any evidence in defence of the plaintiff's claim against him. Authorities such as *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369; *Takako Sakao (f) v Ng Pek Yuen & Anor (f)* [2009] 6 MLJ 751; [2010] 1 CLJ 381 seemed to suggest that a court of law must accept as true the evidence of one party to the litigation, if the other party opted not to go the stand to testify. However the court must not stop short at that because the fact that the defendants led no evidence did not absolve the plaintiff from discharging the burden placed on it by the law. When faced with such a scenario what the court needed to do was to take a step further to evaluate the evidence adduced during the trial both oral evidence through cross-examination and as well as documentary evidence as listed in para 8 above and examine if the plaintiff had adduced unopposed evidence which was credible and sufficient to discharge the initial burden vested on it. On the evidence before me as illustrated above I found that the evidence led by the plaintiff against the above three defendants was satisfactory, credible and had met with the standard required by the law.

CONCLUSION

[135] On the totality of the evidence adduced by the plaintiff through its witnesses both testimonial and documentary and having evaluated the evidence of the first and third defendants I am satisfied the plaintiff had discharged the onus of establishing the issue of liability against the first to sixth defendants on the balance of probabilities. Hence the plaintiff's claims against the first to sixth defendants were allowed with costs and for damages to be assessed. In arriving at the above decision I had carefully considered the evidence adduced by the plaintiff and the defendants both testimonial as well as documentary, the submissions by both the respective learned counsel as well as authorities tendered in support of their respective submissions.

[136] Lastly I would like to express my sincere appreciation to both learned

counsel who had diligently and professionally conducted the trial before me and assisted me with their well researched submission to enable me to dispose the dispute between these two education providers.

Plaintiff's claims allowed with costs.

Reported by Kanesh Sundrum